94.

SUPREME COURT OF THE UNITED STATES.

No. 39.

SYLVESTER L. FOWLER, PLAINTIFF IN ERROR,

VERSUS

HARRIS BRANTLY, ET AL.

ERROR TO THE CIRCUIT COURT U. S. FOR ALABAMA, (S. D.)

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Langtree & O'Sullivan, Print.

UNITED STATES OF AMERICA.

To Harris Brantly, Peyton S. Graves, and Hugh Ferguson, or Gayle and Van De Graff, your attornies, Greeting:

You are hereby cited and admonished, to be, and appear, at a Supreme Court of the United States, to be holden on the second Monday of January next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States, for the ninth judicial circuit, wherein Sylvester L. Fowler is plaintiff, and the said Harris Brantly, Peyton S. Graves, and Hugh Ferguson, are defendants in error, to shew cause, if any there be, why the judegment in the said writ of error should not be corrected, and speedy justice should not be done in that behalf.

Witness, the honorable John McKinley one of the justices of the Supreme Court of the United States, this seventeenth day of May, A. D. 1838.

J. McKINLEY,
Associate Justice of the Supreme Court of the United States.

Service accepted this 17th day of May, 1838.
GAYLE & VAN DE GRAFF,
Deft's Attorneys.

UNITED STATES OF AMERICA.

The President of the United States, to the Judges of the Circuit Court of the United States, for the ninth judicial circuit and southern district of Alabama.

Because in the record and proceedings, as also in the rendition of judgement in a plea, which is in the said circuit court before you, between Sylvester L. Fowler, plaintiff, and Harris Brantly, Peyton S. Graves, and Hugh Ferguson defendants, a manifest error hath happened to the great damage of the said plaintiff, as by his complaint appears; and it being fit, if error there be, the same should be duly corrected, and full and speedy justice be done the parties aforesaid, do command you, if judgement be rendered, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of January next, in the Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further proceedings therein, to correct the errror, what of right according to law and the custom of the United States should be done.

Witness, the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, this second Monday of January, in the year of our Lord one thousand eight hundred and thirty-eight.

[SEAL.]

Issued the seventeenth day of May, in the year of our Lord one thousand eight hundred and thirty-eight.

Attest: DAVID FILES
Clk. So. Dis. Ala.

Circuit court of the United States, for the ninth circuit, southern district of Alabama.

SYLVESTER L. FOWLER
vs.
HARRIS BRANTLY, PEYTON S. GRAVES, and HUGH FERGUSON. } In error.

Know all men by these presents, that we, Sylvester L. Fowler, John B. Toulmin, and Daniel Fowler, are held, and firmly bound unto the above named Harris Brantly, Peyton S. Graves and Hugh Ferguson, in the penal sum of five hundred dollars, to be paid to him, his executors, administrators or executors, for which payment, well and truly to be made, we bind ourselves, and each of us jointly and severally, and our, and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated this 15th May, 1838.

Whereas, the above mentioned Sylvester L. Fowler, hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgement rendered in the above entitled suit, by the circuit court of the United States, for the ninth judicial circuit, southern district of Alabama.

Now, therefore, the condition of this obligation is such, that if the above named Sylvester L. Fowler, shall prosecute his said writ of error to effect, and answer all damages and costs, if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall remain in full force and virtue.

S. L. FOWLER. [SEAL.]
pr. his attorney, J. B. Toulmin.
J. B. TOULMIN. [SEAL.]
C. C. HAZARD. [SEAL.]
D. FOWLER, jr. [SEAL.]

Sealed and delivered in the presence of
JNO. B. HOGAN,
WM. H. DAVIS.

I, David Files, clerk of the circuit court of the United States for

the ninth judicial circuit, southern district of Alabama, do hereby certify, that the above is a true copy of the original bond on file in my office.

In testimony whereof, at office, in the city of Mobile, I have hereunto, set my hand, and affixed the seal of said circuit [SEAL.] court, this twentieth day of June, in the year of our Lord, one thousand eight hundred and thirty-eight.

DAVID FILES,
Clk. So. Dis. Ala.

Pleas had before the hon. the circuit court of the United States, for the ninth judicial circuit and southern district of Alabama, at a term thereof, begun and held in and for said district at Mobile, on the second Monday of April, in the year of our Lord, one thousand eight hundred and thirty-eight, before the Hon. John McKinley, presiding judge, and the Hon. William Crawford, associate judge of said court. Be it remembered, that heretofore, to wit, on the twentieth day of February, in the year of our Lord, one thousand eight hundred and thirty-seven, Sylvester L. Fowler, sued out of the district court of the United States, for said district, his writ of capias ad respondendum, against Harris Brantly, Peyton S. Graves and Hugh Ferguson, in the words and figures following, to wit.

UNITED STATES OF AMERICA.—District Court of the United States, for the southern district of Alabama.

SYLVESTER L. FOWLER,
vs.
HARRIS BRANTLY ET. AL.

The President of the United States, to the Marshal of said district Greeting:

You are hereby commanded *to* to take the bodies of Harris Brantly, Peyton S. Graves and Hugh Ferguson, who are citizens of the State of Alabama, and them safely keep, so that you have them before the Hon. the judge of the said court, at the place of holding said court at Mobile, on the first Monday of May next, to answer unto Sylvester L. Fowler, who is a citizen of the State of Louisiana, in a plea of trespass on the case in assumpsit, to the damage of the said plaintiff four thousand dollars. Herein, fail not, and have you then and there this writ.

Witness, the Hon. William Crawford, judge of the said court, and the seal of said court, this 2nd Monday of December, in the year of our Lord, one thousand eight hnndred and thirty-six.

Issued the 20th day of February, in the year of our Lord, one thousand eight hundred and thirty-seven.

Attest: DAVID FILES.
Clk. So. Dis. Ala.

We acknowledge ourselves, security for costs at the instance of the plaintiff in the above suit.

GORDON, CAMPBELL, & CHANDLER.

SELMA, DALLAS COUNTY, ALABAMA,
March 1, 1836.

Eleven months after date, we, Harris Brantly, Peyton S. Graves, and Hugh Ferguson, jointly and severally, promise to pay Andrew Armstrong, cashier or bearer, two thousand dollars, value received negotiable, and payable at the branch bank of the State of Alabama, at Mobile.

HARRIS BRANTLY,
PEYTON S. GRAVES.
HUGH FERGUSON.

Credit:
DIEGO MCVOY,
HARRIS BRANTLY,
PEYTON S. GRAVES,
HUGH FERGUSON.

The course of action is stated above.
GORDON, CAMPBELL, & CHANDLER.
Atto'rs. for Pl'ff.

Rec'd Feb'y 22d, '37, executed in full, February 28th, 1837.
ROB'T. L. CRAWFORD, *U. S. M.*
By D. CHILD, *D. M.*

And afterwards to wit, at a term of the circuit court of the United States, for the ninth judicial circuit, and southern district of Alabama, begun and held in and for said district at Mobile, on the second Monday of April, in the year of our Lord one thousand eight hundred and thirty-seven, the plaintiff filed the following declaration, to wit:

Declaration.

CIRCUIT COURT OF THE UNITED STATES.—*For the ninth Judicial circuit southern district of Alabama. April term*, 1837.

Sylvester L. Fowler, who is a citizen of the State of Louisiana, by attorney complains of Harris Brantly, Peyton S. Graves and Hugh Ferguson, who are citizens of the State of Alabama, in custody, &c. of a plea of trespass on the case. For that whereas heretofore to wit: at Selma, Dallas Co., Alabama, on the 1st day of March, 1836, the said defendants executed to the said plaintiff, by the name of bearer, their certain promisory note in writing, bearing date the day and year aforesaid, and thereby, then and there, eleven months after the date thereof, jointly and severally promised to pay to the said plaintiff, by the name of Andrew Armstrong, cashier or bearer, two thousand dollars, value received, negotiable and payable at the branch of the bank of the State of Alabama, at Mobile, by means whereof, and by force of the statute in such case made and provided,

the said defendants became liable to pay to the said plaintiff, the said sum of money, in the said promissory note specified; and being so liable, they, the said defendants, in consideration thereof, afterwards to wit, on the day and year aforesaid, undertook, and faithfully promised the said plaintiff to pay him the said sum of money, in the said promissory note, specified according to the tenor and effect thereof. Yet the said defendants although often requested, have not yet paid to the said plaintiff, the said sum of money, in the said promissory note specified, or any part thereof, but to pay the same, or any part thereof, have hitherto wholly neglected and refused, and still do neglect and refuse so to do, to the damage of the said plaintiff four thousand dollars; and therefore he brings suit.

GORDON, CAMPBELL, & CHANDLER,
plff's Att'ys.

And afterwards to wit, at a term of the circuit court of the United States, for the ninth judicial circuit and southern district of Alabama, begun and held in and for said district at Mobile, on the second Monday of April, in the year of our Lord one thousand eight hundred and thirty-eight, before his honor, John McKinley, presiding judge, and his honor, William Crawford, associate judge of said court, the following proceedings were had to wit.

Judgment.

This day came the parties by their attorneys, whereupon, also, came the following jury, to wit: John Howard, A. Hayden, F. F. Swan, E. O. Jones, S. Warren, Thos. St. John, D. W. Tomlinson, J. W. Roper, Sidney Smith, R. D. Hall, E. Chidsey, and Lawrence P. Hill, twelve good and lawful men, who being elected, tried, and sworn, upon their oaths do say, that we, the jury, find for the defendants. Wherefore, it is considered by the court, that the said plaintiff take nothing by his said writ; that the said defendants go hence, without a day, and recover their costs. Whereupon, at the same term, the plaintiff filed the following bill of exceptions, to wit:

Bill of Exceptions.

THE CIRCUIT COURT OF THE UNITED STATES,
For the Southern District of Alabama.

PEYTON S. GRAVES, SYLVESTER L. FOWLER,
vs.
HUGH FERGUSON, HARRIS BRANTLY.

In the trial of this cause, in the said court, the plaintiff to sustain his issue, gave in evidence a note, of which the following is a copy:

SELMA, DALLAS COUNTY, ALABAMA,
March 1, 1836.

Eleven months after date, we, Harris Brantly, Peyton S. Graves,

and Hugh Ferguson, jointly, and severally, promise to pay Andrew Armstrong, cashier or bearer, two thousand dollars, value received, negotiable and payable at the branch bank of the State of Alabama, at Mobile.

HARRIS BRANTLY,
PEYTON S. GRAVES,
HUGH FERGUSON.

Credit:

DIEGO McVOY,
HARRIS BRANTLY,
PEYTON S. GRAVES,
HUGH FERGUSON.

This note contained two endorsements, as follows: Diego McVoy, Wm. D. Primrose; and that of Toulmin, Hazard, & Co., was stricken out; on the face of the note there was in pencil, the figures 169. The defendants offered evidence that the note, in its present form, (except the endorsements,) was sent by one of the makers, to Diego McVoy, who was his factor in Mobile, to be offered for discount, at the branch bank of the State, in that city, as an accommodation note, the proceeds of which were to be forwarded to the said maker. That the note was offered for discount and rejected by the directors. The defendants further proved that the fact or aforesaid, afterwards proposed to raise money for his own use upon it, without the knowledge or assent of the makers, and intended to conceal such appropriation of the note from them. The person to whom this proposal was made, deeming it a fraud, would not concur. Afterwards Diego McVoy, endorsed and transferred the note to Primrose, the second endorser on the note, for twelve hundred dollars, and communicated to him that it had been offered for discount, and rejected, at the bank. The said Primrose endorsed the note, and transferred it in part payment of his endorsement, upon a note made by one Black, for $3,250, and endorsed by Vail and Dade, and said Primrose, which was past due at the time; he paid the balance due on the note to Toulmin, Hazard, & Co., in money, and received the note of Black from them. This note sued on being taken as part payment, by Toulmin, Hazard, & Co.; Toulmin Hazard, & Co., endorsed the note to the plaintiff before its maturity, and received credit on their account with him; they being largely indebted at the time to him, as appeared by their books. It was further in evidence, that this note was in the form prescribed by the said bank, to those who desired accommodations at it; that this form was not in use before its adoption there; that the memorandum on the left hand side of the note, and signed by the drawers, was designed to show the officers of the bank, to whose credit the money was to be placed, should their note be discounted; and that by the usage of the bank, no other person than the one thus named, could receive the money. The said Primrose, testified, he knew by a pencil mark on the face of the note, that it had been offered for discount and refused at the bank when he purchased it; and it was proved by the cashier of the bank, to whom the note was made payable, that the said pencil mark, which appeared on the face of the note, was

according to the usage of the bank made by all notes offered for discount and refused by one of the officers of the bank. It was also proved that Toulmin, Hazard, & Co., were merchants, residing in the city of Mobile, where the bank was located when these transactions took place. The opinions of the judges were opposed upon the question, whether the plaintiff could legally give evidence in this case of the conversation which passed between said Toulmin, Hazard, & Co., and said Primrose, and this is the division of opinion which is stated in one of the instructions asked for by the plaintiff.

The court instructed the jury, that if they believed from the evidence, that the note here sued upon was made by the defendants, for the sole purpose of having it discounted at the bank, and that it was intrusted by one or all of them to said McVoy, to have it discounted at said bank, and to transmit to him or them the proceeds, if discounted, and that after the refusal of the directors of the bank to discount the note, the said McVoy, without the consent of the defendants, sold the note to raise money upon it for his own use, and the plaintiff knew these facts at the time he took the note, or if they believed from the evidence, that the memorandum and pencil mark on the face of the note were such circumstances as ought to have put a prudent man upon an inquiry into the consideration upon which the note was executed, and how it was put into circulation, the plaintiff cannot recover, and that they ought to find for the defendants; and secondly, that if they believed that the note was made by the defendants, and entrusted to the said McVoy, for the purposes stated in the first part of the instruction, and that said McVoy, without the consent or knowledge of the defendants, sold the note to raise money for his own use, and that the plaintiff took it in payment of a pre-existing debt due to him from Toulmin, Hazard, & Co., or any other person, then they ought to find for the defendants, otherwise they ought to find for the plaintiff. To the second branch of the instruction to the jury, the plaintiff, by his counsel, excepts.

The court was asked by the plaintiff's counsel to charge the jury, "that the note imports a credit to Diego McVoy, and that he was authorized by it to dispose of the same, and that if the present holder, or any through whom he claims, took the note upon a valuable consideration, and without any knowledge of any fraud of McVoy, he is entitled to recover. This charge the court refused. The court refused to charge the jury, that if the plaintiff took the note fairly in payment of a debt due to him from Toulmin, Hazard, & Co., before its maturity, and without notice of any instructions the defendants gave McVoy relative to the use he was to make of the note, he was entitled to recover. The court refused to charge the jury, that if they believe the plaintiff took the note bona fide, in payment of a debt due from Toulmin, Hazard & Co., to him, and that he had no notice of any fraud, and there were no circumstances to put him upon an inquiry into any fraud of McVoy, he is entitled to a recovery. The court refused to charge the jury, that if they believe the plaintiff took the note from Toulmin, Hazard, & Co., in payment of a debt due from them to him before the maturity of the note, and